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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No. 70-216

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INTERNATIONAL PAPER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

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## PETITIONER'S REPLY BRIEF

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July 1971

THOMAS OF ROBERT S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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a. The Commission is mistaken in referring (Br. pp. 8-9) to *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 688 (1947), to sustain its attempted reliance on *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950). The question presented in *East Ohio* involved only transportation *for sale*. The earlier language of Chief Justice Vinson in *Interstate* cannot be used to expand the later decision in *East Ohio* beyond its facts, for the question whether interstate transportation that is not for sale is "transportation in interstate commerce" in the statutory sense was even more remote from the facts in *Interstate*. Moreover, in *Interstate* the Court expressly upheld Commission jurisdiction over producers' sales to interstate pipelines as sales that were "in interstate commerce." In view

of the arguments that had been made in that case,[1] this must be understood to mean sales *in* interstate commerce as distinguished from sales that merely *affect* interstate commerce.

The Court thus recognized that the *Shreveport* doctrine is not to be read into the Gas Act (Pet. pp. 8-9). Without the *Shreveport* doctrine, interstate transportation in itself is not sufficient to support the reliance on *East Ohio,* as the Commission's opinion here by necessary implication conceded (Pet., App. B, pp. 26a-27a, ¶¶ 16-19). Nevertheless, the court below seems to assume that it is sufficient, when it says that IP's transportation is "admittedly between two states" (Pet., App. A, p. 7a).

The Commission's attempt (Br. pp. 9-10) to distinguish *Public Service Elec. & G. Co.* v. *FPC,* 371 F.2d 1, 5 (1967), *certiorari denied,* 389 U.S. 849 (1967), by characterizing Texaco's pipeline involved in that case as a facility of its refinery overlooks the fact that IP's pipeline can equally be characterized as a facility of its mill (Pet., p. 13)—in each case the ownership of the line is in the consumer who operates and uses its line exclusively for the purpose of supplying part of the fuel requirements of its manufacturing establishment.

b. The cases relied upon by the Commission (Pet. p. 10) in arguing that it "could properly overrule earlier decisions" either did not involve a consistent

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[1] See the following briefs in that case (No. 733, OT 1946): petitioner's brief, pp. 47-51; brief of Independent Natural Gas Association, pp. 41, 50-52; brief for the State of Texas in support of petition for certiorari, p. 8; brief for the FPC, pp. 20-26. *Cf.* reply brief of petitioner, p. 23.

course of statutory interpretation, or did not involve a statutory interpretation that was not plainly erroneous. The Commission still has not addressed itself to IP's contention that if the Act were originally ambiguous that ambiguity has been removed long since, and only Congress can change the now unambiguous Act (Pet. pp. 11-12).

c. Apparently conceding that the court below erred in affirming the Commission's denial of IP's separation of functions argument on a ground—waiver—not asserted by the Commission, the petition first argues that the court below also based its decision on the ground that IP could not have been prejudiced by Commission failure to separate the performance of the prosecuting and adjudicative functions by its Staff (Pet. pp. 10-11). This ignores the fact that this ground, as well, had not been asserted by the Commission (Pet., App. B, pp. 34a-35a).

The Commission then adds the unsupported assertion that the Administrative Procedure Act (5 U.S.C. § 554(d).) does not require separation of functions in proceedings of this kind (~~Pet. Br.~~ p. 11). But the court below expressly reached its decision "[w]ithout delving into a consideration" of that question (Pet., App. A, p. 14a) and it is, therefore, not presented here.

Respectfully submitted,

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